

THOUGHT LEADERSHIP

News

## DALLAS APPEALS COURT RULES IN FAVOR OF INSURER ON CONSTRUCTION BUSINESS RISK EXCLUSION

Newsbrief

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In *Dallas National Insurance Company v. Calitex Corp.*, 2015 WL 968308 (Tex.App.—Dallas, March 3, 2015), the Court of Appeals for the Fifth District of Texas at Dallas reversed the trial Court's judgment and rendered a take nothing judgment holding the insurer isn't responsible for almost \$700,000 in damages and attorneys' fees awarded against its policyholder in underlying litigation brought by Calitex Corp. over construction defects at a town house project.

The insurance policy in question in this case is a commercial general liability insurance policy issued by Dallas National to Turnkey Residential Group, Inc. ("Turnkey"). In October 2006, Turnkey and Calitex entered into a written contract under which Turnkey, described in the contract as "the contractor," was to be paid by Calitex, described as "the owner," to construct a twelve-unit townhome complex in Dallas, Texas. Pursuant to that contract, the Project was to be completed by Turnkey no later than October 26, 2007. Construction of the townhomes began in November 2006. Problems arose with the project around February 2007, including leaking windows and deficient exterior stonework. Calitex sued Turnkey, its owner and a subcontractor in February 2008 in state court, seeking \$600,000 in damages. On February 14, 2008, Turnkey sent Dallas National a notice of claim and a copy of Calitex's live petition at that time. In a March 4, 2008 letter to Turnkey, Dallas National stated it "has concluded that it has no obligation to defend or indemnify Turnkey as a result of the factual allegations asserted against Turnkey ... by Calitex."

At trial, the jury found in Calitex's favor, awarding the company \$500,000 in damages and \$193,500 in attorneys' fees against Turnkey. In November 2011, Calitex sued Dallas National for breach of contract as a third-party beneficiary under Turnkey's policy.

The trial court in the breach of contract suit granted Calitex's summary judgment motion to award the company the full \$693,500 from the underlying judgment. In a subsequent trial, a jury awarded Calitex an additional \$135,250 in attorneys' fees against Dallas National.

On appeal, Dallas National argued that even if the leaks and defective installation of the exterior stone constituted property damage, evidence shows that much of the damage occurred while construction was in progress, which falls within the business risk exclusion in the policy.

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The appellate court agreed, noting that the insurer cited the testimony of a waterproofing expert who stated that he was called in by Turnkey to investigate and solve water leak problems after construction was "80 percent or 90 percent complete." Calitex's president also testified that he had been on-site every day and discovered that about a third of the units had leaks in August 2007 while construction was ongoing.

In the March 3<sup>rd</sup> opinion, the appellate panel concluded that Dallas National had shown that at least part of the property damage at issue falls within a business risk exclusion in the relevant commercial general liability policy because it occurred while the insured was still working on the project and that Calitex failed to allocate between damages covered under the policy and those that are excluded. Further, the panel found that because the insurer isn't liable to cover any of the underlying judgment, Calitex isn't a prevailing party on either of its claims in the and therefore also isn't entitled to recover attorneys' fees. The panel reversed the trial court's ruling granting summary judgment to Calitex and entered a take-nothing judgment in favor of Dallas National.